

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

550635 B.C. Ltd.
operating as Jack's Towing (1977)

("Jack's Towing" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/304

DATE OF HEARING: August 18th, 1998

DATE OF DECISION: August 27th, 1998

DECISION

APPEARANCES

Glenn Slusar &
Angie Simpson for 550635 B.C. Ltd.

David A. Young on his own behalf

OVERVIEW

This is an appeal brought by 550635 B.C. Ltd. operating as Jack’s Towing (1977) (“Jack’s Towing” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 28th, 1998 under file number ER086-945 (the “Determination”).

The Director determined that the employer owed David A. Young (“Young” or the “employee”) the sum of \$1,893.21 representing vacation pay (\$359.31), two weeks’ wages as compensation for length of service (\$1,000.00), recovery of an unlawful wage deduction (\$497.80) and interest (\$36.10).

ISSUES TO BE DECIDED

The employer appeals the Determination on the grounds that:

- Young was not an employee as defined in section 1 of the *Act*;
- in any event, Young was dismissed for just cause and thus was not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*].

Prior to dealing with these two issues, however, I wish to address a few preliminary matters. The employer does not challenge the Director’s delegate’s award of vacation pay and thus, this aspect of the determination is confirmed.

The delegate’s *calculation* of the amount of the termination pay is similarly not in dispute, only Young’s *entitlement* to termination pay.

Finally, the unauthorized wage deductions consisted of damage to an overhead garage door allegedly caused by Young (\$397.80) and a further \$100 representing an insurance deductible paid by the employer on another damage claim. The employer, by reason of section 21 of the *Act*, was not permitted to deduct these amounts from the employee’s wages and thus this aspect of the delegate’s award must also be confirmed.

I now turn to the two issues before me.

ANALYSIS

Was Young an employee as defined in the Act?

The employer submits that Young was not employed by it; rather, he was an independent contractor. This submission was rejected by the delegate and I entirely agree with the delegate's finding on this issue. This case bears more than a passing similarity to *Coquihalla Towing Co. Ltd.* (EST Decision No. D285/96) where this very same argument--*i.e.*, that a tow-truck driver, paid on a "percentage of revenues" basis and characterized by written agreement as a contractor, was not an employee--was considered and rejected.

As evidence of Young's contractor status, the employer points to Young's "Service Contract", the "Company Policy Manual" and another document entitled "Position Description--Tow Vehicle Operator's Guide". In my view, these documents, rather than establishing an independent contractor relationship between Young and Jack's Towing, conclusively prove just the opposite, namely, that Young was an employee who was subject to a great deal of employer direction and control. For example, Young operated a tow truck owned, insured and maintained by Jack's Towing; Young invoiced customers using Jack's Towing invoices at rates established by Jack's Towing; Young was subject to employer discipline and obliged to wear an employer-provided uniform; Young was in a position of economic dependency vis-à-vis Jack's Towing and was paid, every two weeks, based on his submitted log sheets at a 33% commission rate. Indeed, the "Position Description" refers to various types of conduct that could lead to dismissal--clearly, language that would not be appropriate if Young's relationship with Jack's Towing was truly that of independent contractor.

Based on the definitions of "employee", "employer", "wages" and "work" contained in section 1 of the *Act*, I have no doubt that the *Act* governed Young's relationship with Jack's Towing.

While it is true that the parties' "Service Contract" provides that Young "will be solely responsible for remitting his own federal/provincial taxes and contributions", this provision cannot be relied on by the employer to corroborate its position that Young was an independent contractor. Indeed, Revenue Canada may take the view that the employer cannot avoid its liability to remit taxes based on such a contractual agreement, but, in any event, even if Revenue Canada *was* prepared to accept that Young as not an employee for purposes of federal taxation and related statutes, that position would not determine Young's status under provincial employment standards legislation.

Just Cause

I am satisfied that the employer had just cause to terminate Young's employment. Young admitted that he was aware of the company policy, embodied in paragraph 3(c) of the "Policy Manual", that he was not to use the company tow truck for unauthorized purposes, including personal use. The Policy Manual states that for a first offence a penalty "up to and including dismissal" will be imposed.

The uncontradicted evidence before me is that Young's employment was terminated immediately following an incident when, while on duty in Abbotsford on January 4th, 1998 at about 3 A.M., he left his Abbotsford territory and drove to Surrey to pick up a lady friend at a Surrey nightclub; this woman claimed to be in some sort of trouble at the club. Young concedes that did not have the employer's authority to, in effect, abandon his duties, and then use the employer's truck to travel to Surrey to act as an unpaid cab driver for his friend.

Had this been Young's only act of misconduct, it alone might well have justified termination. Unfortunately, the evidence before me discloses a history of work-related problems--an on-duty accident for which Young was solely to blame; a ticket that was issued to him while on the job for failing to report to a weigh station; there were previous incidents of rudeness involving customers and RCMP officers about which Young was verbally warned; and Young's personal use of a company cellular telephone contrary to employer policy. These events formed part of the record that the employer considered before determining that Young's employment would be terminated. The January 4th abandonment of his duties was a "culminating incident". Further, this termination did not come without some prior warning; Young admitted in his evidence before me that the employer warned him in early to mid-December 1997 that "if he couldn't do the job, he would be replaced".

On the totality of the evidence before me, I am satisfied that the employer did have just cause to terminate Young's employment and, accordingly, this appeal must be allowed in part.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied and that the \$1,000 award representing compensation for length of service be set aside; subject to the appropriate interest adjustment under section 88 of the *Act*, the Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal